

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES**

OMNI ENGINEERING, LLC

and

Case No. 2-CA-35603

RAPHAEL PARRIS, AN INDIVIDUAL

Rhonda Gottlieb, Esq., New York, NY,
for the General Counsel.
*Kenneth R. Plumb, Esq. (Berchem, Moses
& Devlin P.C.)*, Milford, CT, for the
Respondent.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge filed by Raphael Parris, an Individual, on June 30, 2003, and amended charges filed on August 13, September 30, and October 20, 2003, a complaint was issued on December 30, 2003 against Omni Engineering, LLC (Respondent or Omni).

The complaint alleges, essentially, that Parris, an employee, engaged in certain protected, concerted activity in June, 2003, and that the Respondent thereafter threatened to shut its facility and discharge its employees if they engaged in a strike or other concerted activity, and thereafter discharged Parris because he engaged in such activity. The Respondent denied the material allegations of the complaint, and asserted that Parris is an independent contractor and not an employee, and therefore not protected by the Act.¹ On April 14-16, and May 14, 2004, a hearing was held before me in New York, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a Connecticut corporation, having its office in Milford, Connecticut, and a facility in Mamaroneck, New York, is engaged in the installation of cable and related services. Annually, in the course of its business, the Respondent has performed services valued in excess of \$50,000 directly for customers located outside Connecticut. The Respondent admits

¹ The Respondent stipulated that Richard Carr, Melissa Nelson, Timothy Carr, Wayne Donaldson and James Sternkopf are its agents. However, it denied that they are statutory supervisors because of its contention that Parris is an independent contractor. The Respondent further stipulated that if Parris was found to be an employee, it would acknowledge that those individuals are statutory supervisors.

and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

1. The Independent Contractor Question

a. The Respondent's Contract with Cablevision

The Respondent's main business is the installation of cable services for cable companies such as Cablevision, a New York company. It has contracts to perform that service for Cablevision in Long Island and Mamaroneck, New York. Omni asserts that the installers it uses to perform these services are independent contractors and not employees.²

The Respondent's contract with Cablevision, the Standard Installation Agreement (Single Family Residences and Multiple Dwelling Units), was executed on July 2, 2002. Upon the signing of the contract, Cablevision's manager, Gerald Vance, wanted service to begin the next day in Nassau County, Long Island. The contract provides that Cablevision could cancel the contract with five days notice "when it is in the interest of Cablevision." Cablevision guaranteed Omni only 30 days work in Nassau, but if Cablevision desired its services elsewhere it could work in those areas. Omni worked in Nassau and Suffolk counties in Long Island through the middle of January, 2003, and then obtained work in Mamaroneck, Westchester County, New York. Parris first worked on Long Island, and then in Mamaroneck.

Pursuant to the contract, Omni is identified as the "contractor", and "warrants that it is experienced in single family residence and multiple dwelling unit building installations; [and] has available sufficient experienced personnel and equipment to perform the work in an efficient and timely manner..." Omni is required to provide all vehicles necessary for its work, each of which must be white and have a Cablevision sign prominently displayed on it.³ In addition, Omni must make "advance arrangements" relating to labor, tools, equipment and warehousing to meet Cablevision's installation requirements.

Omni is obligated to train, hire, fire, reassign, and lay off its installers and supervisors. The contract further provides that Omni "shall have work crews at work at least eight hours per day, seven days per week, upon five days written notice from Cablevision. The contract states that time is of the essence, and that if the work load requires that the work force be increased or that it work after regular hours, Omni "shall instruct the work force to work after regular hours including Saturdays, Sundays, and holidays, as appropriate...." Raymond Psotta, Cablevision's area operations manager, stated that he did not strictly enforce that provision since there was never was a need to do so, except in an emergency. Instead, he asked Omni whether it could voluntarily provide extra employees when needed. However, pursuant to the contract, he has the authority to require Omni to instruct its work force to work additional time.

According to the contract, Omni must provide "personal supervision" in order to ensure that the work is properly done. Each week, each supervisor is required to inspect at least 25% of the installations performed by each installer. Psotta testified that he has the authority to

² The term "installer" or "installers" will be used hereafter to describe Parris and Omni's other installation technicians.

³ The installers used a magnetic sign which was easily attached to their vehicle.

amend that figure, and although the contract has not been formally changed, he has reduced the number of required inspections to 10% of the installers' work. Such inspections are done inside and outside the customer's house. Omni is also required to employ at least one non-working supervisor for every ten working installers, who is responsible for responding to and investigating and resolving customer complaints.

The contract also requires that Omni conduct a pre-employment investigation of all its installers, including a credit history, criminal conviction record, driving history, previous employment, and screening for illegal drug use. However, as testified by Melissa Nelson, Omni's human resources manager, the background inquiry for the installers included only their criminal record, specifically, whether they had been arrested. The check did not include their credit history or criminal conviction record.

The contract requires that all installers "shall be issued a uniform (including a shirt, pants and jacket), approved by Cablevision." They must also wear an identification badge provided by Cablevision. A copy of the installer's driver's license must be provided to Cablevision at least twice per year. Omni's employees must be of "good moral character and courteous to the public at all times." Omni must also furnish to Cablevision on a weekly basis a list of the names of the installers, their address, phone number, social security number, length of service with Omni, and vehicle license plate numbers.

The contract contains a list of "penalties for non-complying work" which is imposed on Omni, as follows: They include inspected work which does not meet Cablevision's specifications: cost of job plus 10%; employees who are not wearing the uniform approved by Cablevision: \$25.00 per installer per day; vehicles which are not white and do not bear a Cablevision sign: \$100.00 per day; a service call to a customer's home within 30 days of an installation that results in a problem caused by the installer's initial visit to the home: \$75.00; any claim for damage that is not resolved within the "parameters of the contract": cost of damage; any missed appointment that results in a credit to the customer: total credit to the customer; missing or lost identification card: \$25.00 per card; system specific work order preparation/resolution violations: \$100.00 per day; lost check or money order: amount of check + bank fees; missing converter or remote: \$1,000 plus 20%; missing digital converter or remote: \$1500 plus 20%; failure to meet manpower requirements as agreed upon: cost of job plus 20%; other non-performance issues: up to \$500 per day per violation.

b. The Respondent's Use of "Independent Contractors"

Richard Carr, the managing director of Omni, testified that the installers used by Omni are independent contractors.⁴ He decided to use independent contractors and not employees because he needed trained, experienced installers who had a vehicle and tools, and who could begin work at once, inasmuch as Cablevision required that Omni begin its service immediately. Carr further testified that it did not make business sense for Omni to train installers - a four month, costly process, and purchase vehicles if Omni's contract could be canceled in 30 days.

The contract between Cablevision and Omni provides that Omni "may not enter into any subcontracts for portions of the work contemplated hereunder or permit any subcontractor to perform any work hereunder without the prior written request of [Omni] and approval of Cablevision." A form, Exhibit F, attached to the contract, is the document required by Cablevision if Omni desires to subcontract its work. Pursuant to that document, the subcontractor agrees to be bound by the contract between Cablevision and Omni, and also

⁴ All references to "Carr" hereafter will be to Richard Carr unless otherwise stated.

agrees to submit a certificate of insurance to Cablevision. Cablevision can accept or reject the subcontractor, and if it accepts it, Cablevision issues a work order to the subcontractor.

Notwithstanding the above contractual prohibition against the use of subcontractors, Carr testified that he obtained written permission from Gerald Vance at Cablevision, by e-mail, to use independent contractors as installers when he first obtained the contract. However, the e-mails were lost when the file server "blew up," and no further documentation was apparently sought, or obtained. None was produced at trial although the General Counsel subpoenaed such documentation. Indeed, a simple e-mail acknowledging Omni's use of independent contractors would not appear to be sufficient under the contract which requires, as set forth above, a letter from each contractor agreeing to be bound by Cablevision's contract with Omni. There is no evidence that such a letter was obtained from the installers who Omni asserts are independent contractors. Psotta, Cablevision's area operations manager, testified that he was not aware that Omni was using subcontractors to provide installation services, and he did not inquire into the relationship between the installers and Omni. He stated that without Cablevision's written approval, Omni was prohibited from using any contractor to perform the work.

The Respondent maintained a website from about 2000 to the Fall, 2003, which stated that Omni has "qualified technicians that perform both cable installations and telephone installations. Omni technicians are all fully in-house employees, we do not employ any subcontractors. We take the hiring of our technicians very seriously. We check driving histories, screen for criminal records, and conduct drug testing. Our technicians are also trained to provide maximum productivity..." The website also states that "Omni Engineering owns its own fleet of trucks, vans, and other vehicles, all of which are newer than 2 years old."

Accordingly, the website contradicts Omni's assertion at trial that its installers are subcontractors and not employees.⁵ Carr's explanation of this contradiction is that the website actually belonged to his prior company, CATV Associates, and when Omni was formed it could not afford to modify the web page. Thus, Omni's name was simply pasted across the top of the website page, and the name CATV Associates, was deleted. In the Fall of 2003, the website was revised.

The contract between Cablevision and Omni refers to "employee" in its description of the person performing the work for Cablevision's customers. It defines "employee" as "any person or entity employed or otherwise retained by Contractor to perform work under this Agreement regardless of whether such person or entity is a direct employee of contractor, an independent contractor or permissible subcontractor of Contractor."

c. Raphael Parris and The Contract Between Omni and the Installers

Parris was employed with the Respondent from September 14, 2002 to June 25, 2003, working mainly on the installation of cable television and cable modems. His work was exclusively with the customers of Cablevision. At the time he was terminated in June, 2003, Omni utilized the services of about 14 installers.

Parris' prior work experience was with Trinity Cable and Lighting Corp. where he worked as a cable installer. He was referred to the Respondent by one of its installers. In early September, 2002, Parris phoned Carr and expressed an interest in working for Omni. Carr

⁵ The website also contradicts the fact that the installers, and not Omni, own the vehicles used in servicing customers.

asked if he had his own vehicle, and when Parris said he did, Carr asked him what color it was. Parris replied that it was white. Carr asked if he knew anyone else who was interested in working for Omni, and Parris said he did.

5 A few days later, on September 9, Parris and four other Trinity employees went to the Respondent's Connecticut office and met with Carr, Wayne Donaldson, the Respondent's operations manager, and Nelson, the Respondent's human resources manager.⁶ Carr told the applicants that they were required to report to work on time at 7:30 a.m., and have a white vehicle and insurance. Nelson asked the men to sign a Nondisclosure/ Noncompete Agreement,
10 which they did. They were not required to complete an application for employment.

Nelson testified that Parris gave her his business card bearing the name "NMP Corp." when he signed the non-disclosure agreement. In somewhat of a contradiction, she also testified that he signed the agreement and then later that day, during a meeting in the
15 lunchroom, gave her the card. It should be noted that he listed his business name on the nondisclosure agreement as "Raphael Parris." After receiving the card, Nelson did not ask him to change the name on the agreement to his business name, "NMP." Carr corroborated Nelson's testimony that Parris gave them his business card at that lunchroom meeting. As set forth below, Parris denied being asked for a business card until the following month.

20 In this respect, I cannot credit the testimony of Nelson and Carr that, at that first meeting, Parris produced a business card with the name "NMP." If he did so, I believe that Nelson would have had him put that company name on the nondisclosure agreement even if he presented the card after he signed the agreement as testified by Nelson. I make this finding since Nelson was
25 particularly insistent, as set forth below, on paying the installers with checks listing their company names as the payee. As set forth below, Parris' testimony is supported by the installer's agreement he signed at the next meeting which bore his company name, "NMP", which he made up at that time at Nelson's insistence.

30 Nelson then distributed the contract between Omni and the installers, called the Master Agreement, and suggested that they take it home and discuss it with their attorneys. The Agreement states that the installer is an independent contractor, that he is responsible for any payment to his employees, and that a 1099 form will be issued to him. In fact, 1099 forms were issued to Parris in 2002 and 2003. Parris testified that he understood that he was an
35 independent contractor and not an employee when he began providing services for Omni. The Agreement also states that Omni does not provide training or give any work direction to the installer, that he is expected to provide his own insurance, including automobile and commercial general liability insurance, and workers compensation, which names Omni as an additional insured. However, Omni can provide commercial general liability and workers compensation
40 insurance for the installer at the installer's expense. The installer provides his own tools, equipment and transportation, and guarantees his work although Omni will attempt to perform weekly inspections of his work.

45 The Agreement further states that Omni may not require the installer to report for work on any particular day or time, but the "System" [Cablevision], may designate an exact time for a particular job to be done. The Agreement states that no guarantee of work is given, and that available work is allocated on a first come, first serve basis. "Time frames must be met," and if they are not, the installer is charged for any installation charges refunded to the customer. The installer agrees to indemnify Omni against any claims arising from the Agreement. Omni may
50 terminate its contract with the installer if it becomes dissatisfied with his work or performance, or

⁶ The four installers were Joseph Barnes, Ronald Charles, Errol Harrison, and Ian James.

if he does not comply with the Agreement, or for Omni's "convenience." The installer must give 14 days notice to terminate or modify the Agreement, which must be mutually agreed upon. The installer may not subcontract any part of his work without Omni's approval. The Agreement provides that the installer is exclusively responsible for the occupational safety of his employees. In the Agreement, the installer agrees to perform his work in a safe, timely, professional manner, using his best skills and judgment. He further agrees to comply with all codes, standards, licensing, and regulations.

The Agreement has a listing of prices, valid for 12 months, for certain tasks (codes) performed by the installer. For example, a Code 100REV, a new connect, was priced at \$24.00. Parris testified that the listed prices were not subject to negotiation. The other applicants present that day were given the same price list. Coombs testified that there was no negotiation of the rates.

The installers were also given a "Cablevision Installation Manual." The manual listed the Cablevision code numbers and descriptions, contact phone numbers for Omni managers, certain installation instructions, and Omni work rules, discussed elsewhere in this Decision.

d. Violations of the Installer's Contract

The contract also contains the identical "penalties for non-complying work" as set forth in the agreement between Cablevision and Omni, set forth above. In addition, if a customer complains about the work that was done, either Donaldson or an area manager calls the customer to find out what the problem was. If the issue is the installer's attitude, either Donaldson or the area manager resolves it. If the complaint involves damage to the customer's home, the installer must resolve it. If no resolution is agreed to between the customer and the installer, the area manager will investigate the matter, but in any case, the installer pays for the damage, which is the penalty set forth in the agreement.

Omni issued certain written violations to its installers. The violations included "failed to complete work to specified standards in a timely manner", and "poor workmanship, did not replace fittings or splitters." Each notice set forth that part of the installer's contract with Omni relating to "termination of contract," stating that Omni may terminate the Agreement if it becomes dissatisfied with the installer's work or performance. The notice also says that if the installer fails to perform the work "in a satisfactory manner according to standards set by Omni in its sole discretion, Omni may terminate this Agreement immediately...." Carr testified that once Cablevision made Omni aware of poor work, Omni had to speak to the installer. Carr stated that these warnings constituted discipline of the installers.

On October 25, 2002, an Omni memo stated that there would be a \$75 charge for "repeat calls" which is when Cablevision sends a truck to the customer's home to "fix your mistakes." That penalty is consistent with the agreement's provision that a service call to a customer's home within 30 days of an installation that results in a problem caused by the installer's initial visit to the home would result in a charge of \$75.

Parris was told by Omni officials that if he was not in uniform he would be sent home. In June, 2003, Omni issued a memo which stated "you all should be wearing orange shirts. It is an OSHA requirement because you are working on the side of the road. No baggy jeans either, you are climbing ladders and it is a safety issue. You should look presentable, you are representing Cablevision, no holes in your clothing. Truck inspections will now be once a week. Make sure you have all of your tools, signs, and safety equipment. Cablevision will be enforcing by the end of this month 'white vehicles.' You need to have a white truck or van, no SUV's. .. Each vehicle

will be considered on a case-by-case basis. Late arrival charge backs: You must contact the system supervisor [Sternkopf] or Wayne [Donaldson] 1-hour prior, if you are going to be late to a job."

5 Parris stated that his vehicle was inspected twice or three times per week by Cablevision and Omni. If it did not have a Cablevision sign, it could not be operated that day. However, the installers were not prohibited from having other business' advertisement on their vehicles. He was also required to wear an identification badge which identified him as a contractor for Cablevision. Parris' work was inspected about three times per week, but on occasion it was not
10 inspected at all in any given week.

e. The September 13 Meeting

15 On September 13, four days after the initial meeting with Omni, Parris and his four co-workers returned to Omni and met with Carr, Donaldson and Nelson. They each signed the Master Agreement. Parris testified that Nelson asked him to put the name of his company as the name of the contractor. He told her that he did not have a company. She told him to "make one up," and he offered to use "NMP," which are his son's initials, and he did so. Nelson told him to put the letters "dba" in front of "NMP." He asked what "dba" meant and was told that it referred
20 to "doing business as."

They reviewed the contract, which also provides that Omni may hold 10% of the amount billed by the installer as a retainer fee, pending completion and acceptance of the work done by the installer up to a maximum of \$1500 for up to 45 days after the contract is terminated.
25 However, Parris and the other men said that they did not understand that provision, and it was removed from the Agreements. Parris and the other men then signed the Master Agreement. He signed as Raphael Parris d/b/a NMP Corp. According to Nelson, Parris refused to sign the retainer agreement and she deleted it.

30 Parris testified that Nelson told the men that they must report at 7:30 a.m., and work until all the Cablevision assignments were completed. She also said that the men must get contractor's insurance immediately because they would begin work the next day. According to Parris, Nelson also told them that they must have liability insurance, adding that it was very expensive, about \$4,000 to \$5,000 per year, but if they had difficulty obtaining insurance, upon
35 their signing of the Master Agreement she could send them to an agent who could provide insurance for \$1,000 per year. In fact, she gave them the name of an insurance agency, and all of them except Barnes, who did not have a vehicle at the time, purchased insurance there. Nelson testified that Parris said that he could not obtain insurance as it was too expensive, and asked if she knew an agent. Nelson gave Parris a couple of names of insurance agents, and
40 offered that Greg Fidette Insurance was a company that many installers used, and that he should call Fidette.

Nelson also told the men that Cablevision would conduct background checks, and that white vehicles are required. She noted that they also must have tools, but if they did not have
45 tools, they could purchase them from Omni, which would take the money out of their pay. She told them that they must wear an orange t-shirt pursuant to an OSHA requirement, which would be sold to them, and "proper" jeans, steel-tipped boots, a hard hat and a safety belt. Carr stated that an orange shirt is required to be worn due to OSHA regulations, but no other "uniform" is required. In fact, Parris testified that he purchased from Omni an orange t-shirt, and an orange
50 winter jacket, both with Omni's logo imprinted thereon. Carr stated that only an orange shirt, and not a uniform was required. He stated that two installers wore orange shirts with the names of their own companies on them.

In May, 2003, Parris signed an amendment to the contract which set forth new prices as imposed by Omni, and which also contained a list of “contractor daily procedures and requirements.” Pursuant to the amendment, the installer agreed to make sure that all work routed to him by Cablevision was completed. The installer agreed to notify Cablevision if he had any problem appearing at work by 7:30 a.m. He also agreed to submit, on a weekly basis, a list of the installer’s name, “skill set” and work shift. On a daily basis, the installer must have a current Cablevision ID badge displayed prominently, must be properly groomed and dressed neatly in a uniform and, have a Cablevision approved logo on the vehicle, have approved hand tools, meter and safety equipment, and notify the customer and dispatcher if he will be late. It was also stated that Cablevision “will provide access to product, process and technical training as needed or required.”

f. Work Procedure

The work assignment process begins when Cablevision’s customers request service – either a new installation of cable service, or a change in service. Cablevision then creates a route, assigning customers in the same geographical area to the same route. Omni calls Cablevision and requests a route for an individual installer, advising it as to which installers are available. The availability of an installer depends on certain individual preferences, such as (a) a desire to work close to his home (b) a preference for multiple dwelling unit installations (c) certain installers will not perform work in the afternoon due to personal reasons, or need to take a day off and (d) certain installers do not wish to perform certain services, such as modems or digital work. In this respect, Donaldson stated that refusing work does not constitute a violation of the installer’s contract with Omni. Similarly, Sternkopf testified that he could not insist that the installer accept the assignment given him. This stands in contrast to the treatment accorded Parris in March, 2003, in which he refused an assignment and was issued a warning for failure to meet contracted work in a timely manner, and failure to meet contracted manpower obligations, which will be discussed below.

Cablevision attempts to create a route which takes these matters into consideration. It assigns a “tech number” to each work order. Each installer has a specific number assigned to him, and he receives the work orders assigned to that number. Once the route is created, Omni area manager James Sternkopf picks up the work orders, separates them, and gives them to the installer with that number. If an additional work order is received after the orders have been distributed to the installers, the Cablevision manager calls Sternkopf who then calls the installer working in the area and asks if he has the time to perform the service.

Sternkopf receives the work orders from Cablevision between 7:00 and 7:30 a.m. According to Sternkopf, the installers are not required to be at the facility at any specific time. However, if they do not arrive early, their work might have been given to other installers. It has been the practice that most installers appear for work at 7:30 a.m. at which time the most work, and the best routes are assigned.⁷ The installers are not guaranteed any number of installations. In fact, if they arrive late and all the work has been distributed, the installer would receive no work. In addition, Sternkopf stated that work begins at customers’ homes at 9:00 a.m., and the installer should arrive at his first stop before that time. Accordingly, Sternkopf noted that his responsibility is to make certain that the work is done, and that the work scheduled to be done on a particular day is done that day. Once the installer is given his work orders, he requests and receives the material needed, usually Cablevision boxes and modems,

⁷ Donaldson testified that the installers are supposed to be at work by 8:30 a.m. or 9:00 a.m., and Parris testified that Nelson told him that he must report to work at 7:30 a.m.

from his area manager. The installer then begins his work day. Donaldson testified that Omni does not assist the installer in performing his work.

5 Installers Parris and Coombs stated that their work day ends when they complete all their assigned work. Parris stated that, from the start of his employment, he worked seven days per week. About one month after his start, he complained to Donaldson that this work schedule was too difficult. Donaldson told him he must continue to work that schedule because Cablevision arranges the routes based on a seven day per week timetable. Parris refused, and began to work six days per week. Omni officials told Parris that they are entitled to only three
10 days off: July 4, Thanksgiving Day and Christmas Day. In mid November, 2002, Omni issued the following memo to the installers: "All contractors have to work the day after Thanksgiving and the day after Christmas." Parris' payroll records reveal that he did not work the day following Thanksgiving Day, 2002, but he did work on the day after Christmas Day, 2002.

15 Sternkopf testified that the installers are not required to work a specified number of days per week. Nor are they guaranteed a definite number of installations on any particular day since the work is distributed on a first come-first served basis. If the installer is available to work on a particular day, he does so and he receives assignments. If an installer does not report to work and was expected to do so, his work is given to other installers. In such a case, the absent
20 installer is not paid for the day, and no action is taken against him.

 Sternkopf's apparent lack of concern as to whether installers appear at work is contradicted by Carr's memo of October 25, 2002, which stated that a \$50 fine would be imposed if the installer does not appear at work or call. The memo stated that if the installer
25 intended to miss work, he was required to call his supervisor the night before, or by 7:00 a.m. of the day missed. "If you are fined and have a second violation your contract will be terminated immediately."

 Sternkopf's testimony is different. He said that if the installer was expected to report to work but did not, no action is taken against him. Clearly, if the installer called that he would not
30 be at work, then he would not be expected to report to work. Sternkopf was obviously referring to a situation in which the installer did not call and did not appear for work. In such a case, according to Carr's memo, which I find to be more accurate than Sternkopf's testimony, the installer would be fined \$50, and, following a second violation, would be terminated. Sternkopf's
35 testimony is also refuted by the warning issued by him to Parris in March, 2003, discussed below, as a result of his failure to appear for work, and accept his assignments. The warning stated that he failed to complete contracted work in a timely manner and failed to meet contracted manpower obligations, and that he could be subject to termination based on such
40 conduct.

 The Installation Manual advises the installers that "schedules are set 3-4 weeks in advance and you are obligated to fulfill that commitment. Any changes you wish to make [in] your assigned days must be addressed for future weeks and not those already booked. Failure to meet your obligations will result in pass down of any charges from Cablevision or additional
45 costs on our part to complete work you have been assigned. Please make sure that one of your employees or another contractor covers any assigned work if you cannot fulfill your obligation."

 Coombs stated that he was required to accept work assigned by Sternkopf, and Parris testified that Carr warned him about his lateness and his excessive absence, telling him that he
50 must "shape up." Parris responded that he (Parris) was his "own man" and asked whether he was an employee or a contractor, advising Carr that he was treating him like an employee. Further, Coombs was required to notify Sternkopf two weeks in advance that he would be

absent from work for two to three weeks. He stated that on one occasion he wanted to take time off, and Omni refused. He "pleaded" with Omni, and two to three days later, it agreed to permit him to take the time off. Sternkopf stated that if the installer gives him enough notice that he wishes to take time off, he could re-route his work to another installer. He conceded agreeing to all of Coombs' requests for time off. Parris stated that he had to give at least three days notice that he would be absent from work.

However, installer Al Moody stated that he was absent from work about 30 days in the one year of his employment. He stated that he did not need approval in advance to take such time off, and simply told Sternkopf that he wanted to take time off. Sternkopf told him to call when he was ready to return to work.

Each work order contains the time frame within which the installer must arrive at the customer's house. For example, time frames of 9 a.m. to noon; 11:00 a.m. to 2:00 p.m., and 2:00 p.m. to 4:00 p.m. are set forth on the work order. Although the installer must adhere to those time frames in performing the work, the installer decides which customer to go to first. According to Donaldson, if the installer believes that he will be late, he must call the customer and make arrangements to perform the work. If he cannot contact the customer, he must call Cablevision. He also advises Omni, so that he is "protected" from a claim by Cablevision that he did not notify the customer.

Each work order also contains the number of points assigned to that job. The number of points indicates the amount of time the installer should spend on that job. If more work requiring additional time had to be performed, the installer must obtain approval from Cablevision's dispatcher, and notify Omni, through Sternkopf. The installer then changed the number of points assigned to the job, and notified Sternkopf that he would be at the job longer than originally assigned.

During the workday, Parris called supervisor Sternkopf if he had a problem or conflict. If Sternkopf was not available or could not resolve the issue, he called Donaldson. If he needed equipment or keys for Cablevision's lock boxes, he called Sternkopf. If he knew that he would be late, he called Cablevision, then he called the customer, and finally, called Sternkopf. If the customer insisted that he appear as scheduled, he called Sternkopf who would then arrange for another installer to perform the work. Parris further noted that, upon Sternkopf's direction, he contacted the customer if he could not perform the assignment that day, and offered to do the work the following day. If that was agreeable, Parris called Sternkopf and told him of the new date, and Sternkopf then advised Cablevision.

Parris and Coombs testified that they were required to carry a cell phone or Nextel radio so that they could be in contact with Omni. The installer paid for such a phone. Parris testified that he was told that if the phone was turned off, there "will be consequences." He further stated that Barnes told him that he was fired for not having a phone, but when he obtained one, he was reinstated. Coombs testified that he was in constant contact with Sternkopf during the day. At times, he called Sternkopf, and told him how many jobs he finished, and at times Sternkopf called him and asked how many jobs he completed.

g. Installers and Their Helpers

During his initial meeting at Omni on September 9, 2002, Barnes mentioned that he did not have a vehicle. Carr advised him that he would prefer that Barnes have his own vehicle, but he could ride in another installer's vehicle temporarily, but would have to obtain a vehicle eventually. Parris offered to have Barnes ride in his truck, and was told that he would be

responsible for any payments to Barnes. In fact, Parris gave Barnes 40% of his earnings, but Parris paid all the taxes, truck repairs, gasoline and tolls during the two months that Barnes accompanied him. Parris had no control over whether Barnes worked on any particular day, and had no authority to discipline him if he did not appear at work. Parris received more work orders because he worked with Barnes, but if Barnes announced that he could not come to work, Parris notified Sternkopf who reduced the number of his work orders. Parris' testimony that Barnes was given a loan of \$1,000 to \$1,500 by Carr to help pay for his insurance and purchase of a truck was uncontradicted by Carr.

Parris testified that in early 2003, he told Carr and Nelson that Coombs was interested in learning the cable installation business, and that Parris offered to train him. Carr and Nelson told him to train Coombs and advised that Coombs must obtain insurance. Coombs worked with Parris for about one month in 2003. Parris performed the work, and Coombs watched, and in effect worked as a helper. Neither Parris nor Omni paid Coombs for his work. Parris did not receive additional assignments as a result of his working with Coombs.

Carr testified that Omni did not "require" Parris or Barnes to train other prospective installers. Of course, Parris did not testify that the Respondent required him to do so, only that Parris trained him with the Respondent's knowledge and consent. Barnes testified that area manager Joe Mack directed him to train new installers.

Donaldson testified that there are no restrictions on the individuals the installer can employ as long as an insurance policy covers their work. If the installer employs an employee, he must have a workers compensation policy. If the installer subcontracts his work, a liability insurance policy must be in effect.

h. Compensation

Cablevision's customers pay Cablevision for the installation work performed. Cablevision then pays Omni based upon the invoices submitted by it which also contain the installers' work orders for the jobs done. Omni then pays its installers based on the work orders and invoices submitted by the installers. The installers are not guaranteed any minimum compensation. There are paid solely for the work they perform. Either Cablevision or Omni can make deductions in the amount claimed if it finds that the work was not performed, or if the work performed does not match the billing codes. Deductions are also made if Cablevision bills Omni for sending a technician to fix a mistake in the installer's work.

The installer is then sent a billing summary which itemizes the work performed, the installer's charges, and the deductions. If he agrees with the net amount to be paid, Omni's payroll agent, ADP, issues a check. If the installer disagrees with the summary or the deductions, he meets with a company official, usually Donaldson, to resolve the matter.

Carr testified that the installers were not paid the same rate. Rather, the rates varied depending on the specific installer's expertise, experience, length of time with the company, the number of vehicles they supplied to perform the work, and whether they agreed to the company's rate offer. One obvious factor which affects the installer's compensation is the number of days the installer works. Some installers work seven days per week, and others just two. Carr's pre-trial affidavit stated that the price that Omni pays for the work performed by its installers is "basically uniform", with a few installers charging different prices.

In May, 2003, Cablevision put into effect new billing codes for the work to be performed. Omni was asked to submit pricing based on the new codes. Donaldson then gave the new

codes to the installers and asked them to supply pricing and bids for the codes. He stated that the installers submitted their pricing, and that Omni negotiated with them, adding that certain installers refused to readjust their prices, and continued to work under the old prices.

5 Parris submitted a bid for the various work codes, and a few days later, Carr gave Parris Omni's list of the prices it would pay for the work. Parris and Coombs stated that there was no negotiation over this list of prices. In all cases, the amounts Omni agreed to pay were lower, and in some cases much lower, than the prices bid by Parris. For example, Code 100B – Custom Wall Fish, was bid by Parris at \$24.00, and Omni offered \$18.00. Code 200 – Connect Multiple Dwelling Unit, bid by Parris at \$20.00, Omni offered \$19.80. Code 402- Upgrade/Downgrade, 10 bid by Parris at \$27.50, and paid by Omni at \$10.20. Code 402A-iO Digital Converters, bid by Parris at \$24.50, and paid by Omni at \$4.20. 402A – Reco at Tap only/ Trap Change, bid by Parris at \$15.00, and paid by Omni at \$9.00.

15 Accordingly, no meaningful negotiation took place in this documented case. Parris' prices were summarily rejected, and Omni's prices were imposed.

Parris paid for his own gasoline, repairs to his van, and his Nextel phone and EZ Pass tag for tolls. He stated that the only thing that Omni provided was "access to Cablevision work." 20 The installers are not paid for the time they travel to work, for lunch or breaks, or for helpers utilized by the installer.

Installers are not entitled to sick pay, vacation pay, group health insurance, medical insurance, disability insurance or retirement benefits. No deductions were made from the 25 installer's payments for any state, federal or local taxes. Employees of Omni, other than installers, receive health insurance, holiday pay, sick and personal leave, vacation pay, life insurance, and a basic IRA after one year of work.

i. Entrepreneurial Activities

30 In late October, 2002, each installer received a memo from Nelson's human resources department which stated that "I need a business card from every contractor or no payment will be made next payroll." Parris had a card printed which read "NMP Inc., Cable/Satellite/CCTV Surveillance – Installation." It listed a phone number, post office box, and the name "Raphael Parris." He listed satellite and CCTV services because he believed that Cablevision would begin 35 installing satellite systems, and by this means sought to inform Omni that he was capable of performing such services. Parris presented this card to Nelson. It was the first time he gave a business card to Omni. He denied presenting a business card on the day he was hired, as testified by Nelson and Carr.

40 Although the card listed NMP as a corporation, Parris denied incorporating the company. Nor did he maintain a business checking account. He did not file corporate tax returns and did not maintain workers compensation insurance. Parris' most recent personal income tax return contains Schedule C – "Profit and Loss from Business", which includes deductions for 45 depreciation on his vehicle which was registered as a commercial vehicle. Other deductions include advertising, vehicle expenses, insurance, legal and professional services, and office expenses and supplies.

50 When Parris began work he was paid by a check issued to "Raphael Parris." On April 26, 2003, Nelson sent a letter to the installers which stated that beginning May 10, "all checks with the word "or" on it will be issued with just the business name." Apparently, the installers had checks issued with their personal name "or" a business name, and cashed the check with their

personal name only. Parris told Nelson that he did not have a registered company, and if his check was paid to "NMP," he would be unable to cash the check. Nelson asked him to sign a letter, dated April 29, which stated that he no longer does business under "N.M.P." and will continue to work d/b/a Raphael Parris. The letter requested that checks be issued to "Raphael Parris." Parris further testified that Nelson asked him to have business cards printed with the name of the company d/b/a Raphael Parris. The printing company he went to told him not to use "d/b/a" if he does not have a registered business. Accordingly, the card stated "Raphael Parris" and indicated that he was engaged in the installation of cable television, satellite, C.C.T.V. and burglar alarms.

Parris never engaged in outside business while employed by Omni because he did not have the time to do so. He stated that he worked from 7:30 a.m. to about 10:00 p.m., after which he returned to Cablevision to drop off his work orders.

Parris testified that he was permitted to perform additional work for Cablevision customers if that work was not listed on his work order, but first he had to call Cablevision to learn what the rates would be and then inform it of the additional work to be done. Next, Parris had to advise Sternkopf that he would be performing additional work which was approved by Cablevision. Sternkopf never objected to Parris' performance of extra work. Cablevision charged the customer for the additional work, and paid Omni for Parris' services. Omni then paid Parris. Parris received no payment from the customer, and he was not able to set prices for Omni or Cablevision. In this regard, Coombs' testimony corroborated that of Parris.

In late October, 2002, Carr issued a memo to the installers which stated that "ID badges must be visible AT ALL TIMES. No contractors are allowed to solicit work from customers when working in their home. If you do, you are in violation of your contract. If customer wants additional work done, call Wayne [Donaldson] for the proper procedure." The ID badge states "Omni Engineering CONTRACTOR Cablevision."

Parris testified that when his contract was terminated, he did not file a claim for unemployment insurance because his uncle had a bad experience with that agency, and received little money when he filed. Accordingly, Parris did not believe that it was worth the effort to file for such benefits.

Parris did not ask Omni to deduct taxes from the checks he received, and did not request that it issue him a W-2 form and not the 1099 form that he did receive from the Respondent. Following a traffic accident while at work, he did not file a claim for workers compensation benefits.

Parris received \$100.00 for each new installer he referred to Omni, and he received a total of \$500.00 from the Respondent for that reason.

Installer Coombs testified that he has a registered business, called AC Trini Computer, which he started in January, 2003, through which he performs cable installation, and sells and services computers to individuals and small businesses. He began work as an installer with Omni in February, 2003, but still conducts his separate business activities on the days of the week in which he does not work for Omni.

Installer Clarence Millwood testified that he does not work for any company other than Omni since he has no time for other business activities. Carr identified four installers who worked for companies other than Omni.

2. Parris' Incidents at Work

a. October or November, 2002

5 Parris testified that one day in October or November, 2002, he and Donaldson discussed Parris' completed work orders and the codes he assigned to the work done. Parris questioned Donaldson's corrections to the work orders which would have resulted in Parris receiving less pay for the work he did. Parris asked him three times to read the comments on the work orders which justified the code assigned by Parris. Donaldson at first said that he did not have to read the comments, but then did. Parris testified that, at this point, he realized that he was "having a problem" with Donaldson, and asked Carr to join them. Carr was painting the hallway at the time and continued doing so.

15 Parris then told Donaldson that his improper corrections were "unfair." Parris became upset and began crying because Donaldson was arbitrarily removing the codes which he properly assigned, thereby reducing the amount of money he would be paid. Parris stated that he then flipped in the air the 2½-foot by 5-foot plastic table that Donaldson was working on. Donaldson jumped back, and according to Parris, the table did not touch Donaldson. Parris then picked up a chair and threw it against the wall. Area manager Darrell Gaines rushed in, put his arms around Parris, and he and installer Barnes pushed him against the wall. They then escorted him out of the building.

25 After a time, they returned inside, with Gaines warning Parris to calm down, and not put his hands on Donaldson. Carr told Parris not to worry about it, but that he should go home, calm down, and return to work the following day. Parris did not receive any warning or discipline for this conduct, and resumed work the next day.

30 Donaldson testified that when they were reviewing certain work that Parris did, Donaldson asked Parris for an explanation as to why he installed certain items and not others. According to Donaldson, Parris replied that he had no "fucking right" to tell him what to do since he is a contractor.

35 Donaldson testified that during this incident, he questioned Parris' charge, in which he submitted an invoice that indicated that he took extra time on the job, but in fact the job only took 45 minutes. Parris explained that he had a helper and thereby did the job faster. Donaldson replied that the work done was a "piece rate job" in which he gets paid a flat rate for the job, whether it took ten minutes or three hours. Parris answered that if he did not get the higher amount he could not pay his helper. Donaldson said that did not matter, whereupon Parris slammed his hands on the table, stood up and flipped the seven to eight foot wooden table onto his lap, which fell on his feet. Parris threw one chair against the wall, picked up a second chair and began to approach Donaldson. Gaines and Barnes pushed Parris against the wall, with Parris continually repeating "he's got no fucking right." They escorted Parris out of the building.

45 Donaldson testified that although he felt threatened by Parris' actions, and was concerned about his safety since he was backed up against the wall with no way to exit, he nevertheless did not call the police, and did not discipline Parris for his actions toward him. Donaldson reasoned that this was his first incident with Parris, and he deferred to area manager Gaines who apparently saw no reason to discipline him or terminate his contract. Further, Donaldson conceded that it was Omni's responsibility to make sure that Cablevision's customers were visited by installers who did not engage in inappropriate conduct or display a nasty attitude, but he had a "degree of assurance and belief" that Parris would behave appropriately in dealing with difficult customers.

Carr essentially corroborated Donaldson's version of the events, but added that later he spoke with Donaldson and Gaines regarding the possibility of terminating Parris' contract. Gaines wanted to retain him since he needed more workers, he had not had any problems with him, and the quality of his work was good. Carr deferred to Gaines' opinion. Although Carr of course knew that Parris would be servicing customers who are sometimes difficult, nevertheless he believed that Parris' temper was directed at Donaldson and not at customers, and he "trusted" Parris enough that he could control his temper with Cablevision's customers.

b. March, 2003

On March 17, 2003, Parris arrived at work and was given work orders by Sternkopf which did not bear his installer number. Parris asked him where his work orders were, and Sternkopf replied that he gave them to another installer. Parris told him to recall that installer. Sternkopf refused, telling him to take the work orders assigned. Parris refused, saying that if Cablevision's quality control department had problems with the work orders bearing his number, he would be held responsible, and not the installer who actually did the work.

According to Parris, Sternkopf made calls to Carr and Donaldson. Sternkopf left and returned with a document which stated that Parris violated certain terms of his contract by failing to complete "contracted work in a timely manner, and failure to meet contracted manpower obligations." The letter warned that his contract may be terminated based on this conduct. Parris refused to sign the warning, saying that he did not breach his contract. An "out of control shouting match ensued. Donaldson and Sternkopf testified that this violation was issued because Parris had a history of requesting work, but then not coming in to work or coming in very late.

Parris then got into his van and blocked the Cablevision driveway. After about 15 minutes⁸ he moved his van. During the time of the blockage, no vehicles attempted to enter or leave the Cablevision premises. Parris then called Carr and told him that he received a notice that he violated his contract, and would not sign it. Carr told him not to worry about it, he did not have to sign it, and that he should go to work and forget it. Parris went to work, and thereafter received no warning or disciplinary action for his incident with Sternkopf or for blocking the Cablevision driveway.

Sternkopf testified that during this period of time, Parris was failing to appear for work, and Sternkopf was "getting stuck on a fairly regular basis; holding work for him and he wasn't showing." He reported this fact to Omni's office, and a letter was prepared which Sternkopf gave him that day. Sternkopf stated that when he gave Parris the letter, he "got right in [my] face" and screamed at him, saying "it's a bunch of bullshit," he is a contractor and the contract does not require that he fulfill any obligations. Parris then blocked the Cablevision driveway and Sternkopf called his office. Donaldson told him to call the police if the situation got out of control. Sternkopf was about to call the police when Parris moved his vehicle. Carr became aware of this incident, but nevertheless, retained him knowing that he would be dealing with the public.

c. April or May, 2003

Parris was in the parking lot at the Mamaroneck facility when installer Coombs arrived in his truck with a passenger. Donaldson asked who the passenger was. Coombs said that he was a friend who may be interested in working at Omni, and he was showing him how the work was

⁸ Parris later testified that the van blocked the driveway for 2 to 2 ½ minutes.

performed. Donaldson said that anyone riding with an installer must have insurance. Coombs asked why he had to have insurance.

At that point, Parris intervened, asking Donaldson what he was talking about, calling his statement "ridiculous," adding that the passenger just wanted to see if he was interested in becoming an installer, and inquiring why he had to obtain a \$5,000 insurance policy when he did not know if he would be interested in such work. Parris further announced that since it was Coombs' truck he could transport whomever he wanted. Donaldson insisted that the passenger must obtain insurance. Parris stomped on the floor, moved his fists up and down, and continued to argue with Donaldson, asking what insurance was required. The loud argument, which got "out of hand" according to Parris, developed into a shouting match with Parris telling Donaldson that he did not know what was going on at the site. The dispute continued until Cablevision manager Psotta arrived in the lot and said he could shout louder than him. Alex, a Cablevision manager, asked Paris to take it easy and to do him a favor and apologize to Psotta.

Parris apologized to Psotta, telling him that his outburst was caused by Omni doing "crazy" things such as telling the installers, who were supposed to be contractors, that they could not bring a passenger in their truck. Psotta replied that Omni is given free space to operate on Cablevision's premises because the installers are supposed to be employees, and not subcontractors, and that if he hears that the installers are contractors he would immediately "pull" the Omni contract. Psotta told Parris that his outburst would not cause any problems between them, but that this "scene" should not occur again.

Parris then called Melissa Nelson, and said that he just heard that Omni is "not supposed to have contractors." Nelson asked where he received that information, but Parris did not reveal that Psotta was his source. She told Parris that she knew that the workers were supposed to be employees and not contractors, but that "we have it all worked out."

Parris testified that he was terminated perhaps one to three weeks after this latest shouting match, which he believed occurred in June.

Donaldson testified that while he was telling Coombs that his passenger had to have insurance, Parris ran up to him "screaming" that he could not tell Coombs what to do – that as a contractor he could hire who he wanted, and did not need insurance. Donaldson stated that Parris was "in his face," hands clenched at his side, jumping up and down, with spittle hitting him as he spoke. Donaldson insisted that Coombs' passenger must have insurance since he was entering customers' homes. Psotta arrived on the scene and said "I don't want him in the system." Donaldson agreed, and Parris left the area.

Donaldson testified that he was going to give Parris a notice that his contract was terminated when he visited Psotta and learned that Parris had apologized. Psotta simply considered the matter a "hothead issue" and offered his opinion that Parris could continue to work. Donaldson then asked area manager Sternkopf what action he wanted to take. Sternkopf said that Parris should be retained because he had "no issues or problems" with Parris, the facility needed workers, and inasmuch as Parris was a member of a union he was able to provide service to a "union building" at which only union members were permitted to work. Accordingly, inasmuch as Donaldson usually defers to the wishes of his area managers, no adverse action was taken against Parris, and he continued to service customers as usual.

Psotta testified that during the disturbance he observed Parris shouting and cursing Donaldson in the parking lot. Psotta told the participants to stop shouting or leave the premises. Thereafter, Parris apologized to him. Psotta stated that he did not tell Omni that it should not

permit Parris to service Cablevision's customers. Psotta believes that the installers who service his customers should be polite, and he is also aware that certain customers can be "troublesome", but he did not give any thought to whether Parris would be abusive to his customers, and he would not permit Parris to service those customers if he believed he would be abusive to them.

Carr testified that Psotta called him and advised that he had a "yelling match" with Parris. Carr replied that he had already been notified by Donaldson of the incident. Carr asked Psotta what he wanted Omni to do about it, specifically, whether it should terminate Parris. Psotta said he knew Parris, felt comfortable with him working there, and wanted him to continue work. Carr agreed.

d. Mid to Late June, 2003

Parris testified that upon receiving his paycheck at the Mamaroneck location on the second or third Saturday in June, he noticed that the amount of the check was less than the amount on the invoice he submitted to Omni. He was present with co-workers Ashton Coombs, Gordon, Mitchell Jones, Clarence Millwood, and others. Alex, a Cablevision manager, was also present. The other installers were also complaining and said that their checks were also wrong. It was agreed that this practice "has to stop." According to Millwood, this was a "never ending story" in which, for the past two months, installers had been receiving less money than their invoice sums. They asked Parris what he intended to do. He volunteered to call Donaldson.

Parris stated that he called Donaldson on the Nextel radio, and told him that "we have pay issues" and "we need you to come down here right away." Donaldson said that he could not get there immediately, but would deal with the matter on Monday. Parris persisted, saying that it had been going on too long, and that Donaldson must come immediately "otherwise, we're not going out to work." Donaldson replied "if you all don't go out, I will shut the system down, replace all you guys." Parris further stated that Cablevision manager Alex heard Donaldson's remark, and that Alex asked the workers to do him a favor and go to work. The men then went on their assigned routes. Installer Coombs essentially corroborated Parris' version of this conversation. Installer Al Moody denied hearing this conversation, but Parris testified that Moody was not present when it took place.

Donaldson testified that he was a party to a "major incident" in the Mamaroneck system. He received a call from an installer who he could not identify but he did not believe it was Parris, who said that the men "were not going to take their work that day, that they were concerned that everything was screwed up, everything was wrong."

The caller apparently asked that Donaldson meet with them in Mamaroneck that day, as Donaldson said that he could not come to the facility that day. He told the caller that he would review their complaint and would come to the facility the following day and discuss the matter with them. Donaldson reviewed the invoice sheets and noticed that Omni had made an error by using the wrong codes which resulted in a loss of money for the installers. The installers were called that day and advised that an error had been made, and that their invoices had been corrected with the new amounts to which they were entitled.

Donaldson denied that he was told that the installers were going on strike, and specifically denied the conversation that Parris testified to. Donaldson further denied telling any installer that he would cancel their contract if they struck, or that Omni would shut down its operations if the installers struck. Donaldson noted that he does not have the authority to

threaten a shutdown of operations, and further, the consequences of such an action would be that Cablevision would terminate Omni's contract at all its locations.

Carr testified that late one morning in mid May, 2003, Psotta called him and said that some of the installers, without naming them, were still in the parking lot claiming to have an "issue" regarding their pay. They were waiting to hear from Donaldson, and refused to go to work until they spoke to Donaldson. Carr told Psotta that he had not heard about this matter. Psotta told Carr that if they went to work he would guarantee that the matter would be resolved by the time they finished their assignments that day.

Carr called Donaldson, who said that there was a problem with the pay sheets and that he was correcting it. Sternkopf denied being present during any phone call by the installers to Donaldson, and also denied hearing that installers wanted to strike.

Parris testified that when he reported to work the following week, either the third or fourth week in June, Sternkopf told him that Donaldson directed that no work be given him, and instead that he report to Donaldson's Connecticut office so that they could resolve Parris' pay issues. Parris was reluctant to lose a day's pay and travel to Connecticut, so he phoned Donaldson, who told him that he must come to Connecticut to resolve the problems he had with his pay. Donaldson denied Parris' request for a Sunday appointment, saying that he did not want Parris to be dissatisfied with his pay, adding that if he did not report to Connecticut immediately, he would not be given any work. Parris traveled to Connecticut that day.

Donaldson and Parris reviewed Parris' work orders, and mistakes that had been made by the Respondent were corrected. When they were finished, Donaldson asked Parris to enter his office, and told him "by the way, before you leave, I just want to tell you this, I will not tolerate anyone threatening to strike in my company." Parris replied that this would not have happened if the Respondent had been paying the installers what they were entitled to, adding that this was an "ongoing" problem. Donaldson said "anyway, I am not going to tolerate anybody striking and if you do, [sic] again, I will shut the system down and replace all of you immediately."

Donaldson testified that in May, he spoke with Parris in the Connecticut office regarding adjustments made to his invoices. Errors were found in calculations made by Omni and Parris. According to Donaldson, Parris told him that he was confused about certain adjustments, and admitted that he was "off his medication and that's why he goes berserk at times." Parris denied that this conversation occurred, and also denied that he takes any psychotropic medication.

I credit Parris' testimony regarding this incident, and discredit Donaldson's version. Although there was some discrepancy regarding the date the phone call was made by Parris to Donaldson, whether it was in May or June, there can be no question that the call was made. The precise date is of no moment.

Donaldson's testimony supports Parris' version. He stated that he received a call from an installer who said that the installers were not going to take their work that day, and that everything was screwed up and wrong. How can Donaldson deny that he was told that the installers were going on strike. Their refusal to "take their work that day" is a statement that they would strike. Carr also supports Parris' testimony. He testified that he was told that the installers refused to go to work until they spoke to Donaldson. That is further evidence that he knew that the installers were going on strike unless their pay issues were remedied. The importance of this event to the Respondent is evidenced by the fact that Donaldson referred to it as a "major incident." It did have that importance, since the Cablevision contract would be jeopardized if the

installers refused to do the work contracted. Further, Donaldson's version mirrors Parris, in that Donaldson stated that he was asked to come to the site that day, but refused.

I cannot credit Donaldson's denial that it was Parris who threatened to strike. There is no claim that anyone else made the call, I credit installer witnesses Coombs that Parris called, and it would be unusual for Donaldson to forget who made the call which precipitated this "major incident." Further supporting the fact that Donaldson knew that Parris made the call was Parris' credited testimony that he was directed to report to Donaldson, at which Donaldson told him that he would not tolerate anyone threatening to strike, and if Parris did it again, Donaldson would shut the system and replace all the installers.

The Respondent argues that Donaldson had no authority to shut Omni's Mamaroneck operations, since that would constitute a breach of Omni's contract with Cablevision which required 30 days notice and would expose Omni to significant damages. The system was not shut down. This was simply a threat to shut down Omni's operation. Donaldson's own characterization of the threat to strike as a "major incident" would reasonably prompt an aggressive response so that the threat to strike would be withdrawn and not repeated. That he considered it a very serious matter is reflected by the fact that Donaldson has Parris miss work so that he could deliver the threat to Parris in person, with its obvious impact.

e. June 25

Timothy Carr, Richard Carr's brother, is the Respondent's operations manager who oversees the contractor labor supplied for the Cablevision contract. In about mid-June, 2003, he was temporarily assigned to the Mamaroneck location to help Sternkopf. In that capacity, he collected paperwork from the installers and issued supplies to them.

Parris testified that on June 25, he called Cablevision and was told how many work orders he was assigned. While driving to Mamaroneck, he called Sternkopf, apparently to tell him that he would be late, that he knew how many work orders he had, and that Sternkopf should not "mess with them." Sternkopf replied that the work orders belong to Sternkopf until he issues them to Parris, who then answered "if you mess with my work orders, you will find out when I get there."

Parris stated that when he arrived at the Mamaroneck facility, he went over to Coombs, who was doing his paperwork. While they were talking, Timothy Carr asked Coombs to come to the desk to pick up his work orders. Coombs asked Carr to wait one minute since he was finishing his paperwork. Carr replied that Coombs had no right doing his paperwork there, and that he should have done it at home. Parris intervened, asking Carr to give Coombs "a break." Carr again asked Coombs to approach the desk to receive his orders. Coombs again said he would finish his paperwork and then get the orders.

Parris then told Carr that the Respondent "just keeps changing things around" – that the workers have been doing their paperwork in this office for a long time and never had a problem doing so, and now "all of a sudden" they have to do it at home. Carr replied that the installers are not doing what they are supposed to do, and he was there to make many changes which will become apparent in time. Parris asked what changes would be made, especially since the installers are doing their jobs, and then accused Carr of not doing what he was supposed to be doing. Carr answered that he heard that Parris had just threatened one of his supervisors. Parris asked who he threatened, and Carr said he threatened Sternkopf. Parris denied threatening him, and Carr quoted Parris as having told Sternkopf that if he messed with his work orders, he will find out, or he will find out when Parris arrived at Mamaroneck.

Parris admitted saying that to Sternkopf, explaining that Sternkopf knew that if he interfered with a work order, or if Parris received a work order with a different installer number, he would be "very annoyed." Later, Parris testified that in saying that Sternkopf would "find out,"
 5 he meant that they would have a "discussion about the matter," and that he either would do the work set forth in the order or not. Carr repeated that Parris threatened his supervisor, and Parris denied doing so. They began arguing, with Parris speaking about how the company was operated, voicing his belief that there were more chiefs than Indians. At that point, Carr announced that Parris' contract was terminated. Parris replied that Carr did not hire him, and
 10 Carr replied that he could terminate his contract. The argument continued, with Parris telling Carr that he was not even officially introduced to the workers. Rather he just came to the facility and began "throwing [his] weight around." Carr told Parris to leave, and Parris replied that Carr was not the owner of the facility and that he (Parris) had as much right to remain on the premises as Carr did. Carr answered that inasmuch as Parris no longer worked for Omni, he
 15 must leave. Parris refused, and the argument continued. Finally, after appealing to Alex to no avail, Parris left.

Coombs essentially corroborated Parris' version of the conversation, adding, however, that Carr told Parris that he was a "troublemaker" and that he knew how to deal with people like
 20 him, and that Carr told him twice to "hush your mouth."

Installer Al Moody testified that on the day that Parris was terminated, he, Parris, and the other installers were speaking about their routes. He heard Parris tell Carr that he was not happy with his route, his working conditions, and the way that work matters were being handled.
 25 Parris denied that Moody was present that day.

Sternkopf testified that Parris called him in the morning and said he was late. Parris told him he knew his routes for the day and advised Sternkopf not to "touch" his routes, adding in a threatening tone, that "if you manipulate or change my route around in any way, shape or form, you'll suffer severe consequences." It should be noted that Sternkopf's pre-trial affidavit stated
 30 that Parris told him only that there would be "consequences" if he changed his work. Sternkopf conceded that Parris did not say that the consequences would be suffered by Sternkopf, nor did he specify exactly what the consequences would be. However, Sternkopf believed, based on his past relationship with Parris, and by his current tone and mannerisms, which were angry, nasty
 35 and upset, that Parris was threatening him.

For reasons of safety, Sternkopf advised Timothy Carr that he "had a feeling" that when Parris arrived at work that day, "something would happen." He mentioned this to Carr because although he expected Parris to see him for his work orders that morning, in the event that he
 40 was not there and Carr was, Carr would know "what was happening." Nevertheless, Sternkopf did not call the police, and he did not wait with Carr when Parris arrived. Notwithstanding Sternkopf's concern that Parris was a threat, he expected – "why not" - that Parris would service Cablevision's customers that day. Carr told him that he should not worry, and that they would deal with the situation as it arose.

45 Sternkopf testified that after Parris arrived at work, he saw him and Carr yelling, with Parris saying that Carr had no right and no authority to terminate his contract.

Carr testified that he first became employed in Mamaroneck in June, 2003, and was
 50 assigned to help Sternkopf. At that time he learned of two incidents involving Parris: that he lunged at Donaldson over a desk, which led him to believe that he engaged in violence in the workplace, and that he blocked a driveway.

Carr stated that Sternkopf told him that he received a phone call from Parris in which he threatened that if his route was changed in any way he would “face the consequences.”⁹ The threat had something to do with work orders. Carr told Sternkopf that he would look into it when Parris arrived. When Parris arrived, Carr asked him if he threatened Sternkopf regarding his routes, or in any way. Parris became very angry, began shaking and walking towards Carr, who asked him to calm down.

Carr believed that it was best if Parris left the immediate area so the dispute would not escalate. Nevertheless, Carr approached Parris, and Parris, in an upset and very loud manner, walked toward him with his arms waving up and down, saying “you have no fucking right to ask me this question.” It should be noted that Carr’s pre-trial affidavit did not mention that Parris used any profanity. Carr testified that he felt “very threatened,” but did not call the police because he did not believe there was a need to do so. Carr told Parris that his contract was terminated. Parris then left and Carr waited for a while but then searched for Parris. He found him in Alex’s office, where Carr told Alex that Parris was no longer a contractor for Omni. Alex told Parris to leave and he did, but then began speaking with Cablevision’s installers. Carr told him to leave, and Parris asked Carr to get away from him.

Carr testified that he decided to terminate Parris’ contract because he believed that Parris had demonstrated that he was prone to commit violence in the workplace. Carr based this belief on this last incident in which he felt “very threatened,” Parris’ threat to Sternkopf that day, and his lunging over the desk at Donaldson. Carr stated that he was “amazed” that Parris’ contract was not terminated after that incident. Carr was more concerned that Parris’ blockage of the Cablevision driveway, which he considered “very serious,” would impair Omni’s relationship with Cablevision. Carr testified that he had not heard Parris or any contractor threaten to strike if certain pricing issues were not addressed by Omni. Carr stated that he had no discussion with Coombs that day regarding his completing paperwork at the facility.

Donaldson testified that Parris called him the day his contract was terminated, and asked that his contract be reinstated. Donaldson said he would speak to Carr, but that he would defer to the area manager, and whatever Carr wanted to do was up to him. Parris replied that he (Donaldson) “would be sorry for that.” Parris denied that conversation, and it seems unlikely that he would call Donaldson, with whom he had an acrimonious relationship, to ask that his contract be reinstated. Donaldson denied having any involvement with Parris’ termination.

On June 27, the Respondent sent a letter to Parris which stated that their contractual relationship has been “closed out.”

Analysis and Discussion

I. Independent Contractor Status

Section 2(3) of the Act states that the term “employee” shall not include “any individual having the status of an independent contractor.” The Board applies the common-law agency test, and also considers “all the incidents” of the individual’s relationship to the employing entity in determining whether an individual is an employee or independent contractor. No one factor is decisive. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968); *Roadway Packaging System*, 326 NLRB 842, 843 (1998). In *BKN, Inc.*, 333 NLRB 143, 144 (2001), the

⁹ Carr’s pre-trial affidavit does not mention “consequences.”

Board set forth the multifactor analysis in Restatement (Second) of Agency, Section 220, which it examines in determining independent contractor status::

- (1) The control that the employing entity exercises over the details of the work;
- (2) Whether the individual is engaged in a distinct occupation or work;
- (3) The kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision;
- (4) The skill required in the particular occupation;
- (5) Whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (6) The length of time the individual is employed;
- (7) The method of payment, whether by the time or by the job;
- (8) Whether the work in question is part of the employer's regular business;
- (9) Whether the parties believe they are creating an employment relationship; and
- (10) Whether the principal is in the business.

The question which must be decided is whether the relationship between Omni and the installers is one between two businesses or one between employer and employee. *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 894 (1998).

The party asserting that an individual is an independent contractor has the burden of establishing that status. *Central Transport, Inc.*, 247 NLRB 1482-1483, fn. 1 (1980). Thus, the Respondent must establish that Parris is an independent contractor. As in many cases of this type, there are facts supporting the finding of employee status, and there are also factors which support the finding of independent contractor status. I find that those factors supporting the finding of employee status predominate over those supporting the finding of independent contractor status.

As in *Roadway*, where the Board found that the individuals involved were employees and not independent contractors, the installers here perform functions that are an essential part of Omni's main business, the provision of installation of cable services to the customers of Cablevision. Although some of the installers engage in outside business, they do so only when they are not actually servicing Cablevision's customers. In this regard, Coombs' testimony that he performs independent computer services while doing installations for Cablevision's customers, is unclear, and would appear to violate the warning issued by Omni, that installers are in violation of their contract if they solicit work from customers when working in their home. Accordingly, the installers "devote a substantial amount of their time, labor, and equipment to performing essential functions" for Omni. *Roadway*, 326 NLRB at 851.

Omni held itself out to the public and to its main customer, Cablevision, as a company which employed its own employees and not independent contractors. From the inception of its arrangement with Cablevision, Omni entered into a detailed contract with that company in which it made certain representations as to its work force. For example, it guaranteed that it would instruct its work force to work after regular hours, including weekends and holidays. This is at odds with Omni's assertion at hearing that it has no control over when an employee works. Moreover, a memo issued by Carr in October, 2002, stated that if the installer does not appear at work or call he would receive a \$50 fine. The memo further stated that the installer must call his supervisor the night before, or by 7:00 a.m. of the day he intends to be absent. This is a reflection of the control an employer exercises over an employee rather than an independent contractor's relationship with another business.

The contract between Cablevision and Omni refers to “employee” in its description of the person performing the work for Cablevision’s customers. It defines “employee” as “any person or entity employed or otherwise retained by Contractor to perform work under this Agreement regardless of whether such person or entity is a direct employee of Contractor, an independent contractor or permissible subcontractor of Contractor.”

The Respondent argues that inasmuch as its contract with Cablevision defines “employee” as including independent contractors, Cablevision “anticipated, expected and authorized” the use of independent contractors. I agree. However, the contract, as set forth above, required Cablevision’s prior written approval if Omni wanted to utilize independent contractors. This condition was not satisfied, and Omni was therefore in violation of its contract with Cablevision.

Accordingly, Cablevision had no knowledge that Omni was using such contractors. This is supported by the testimony of Cablevision’s manager Psotta, who stated that he was unaware that Omni was using subcontractors to provide installation services, and that without Cablevision’s written approval, Omni was prohibited from using any contractor to perform the work. Although Psotta stated that the nature of the relationship between Omni and installers was irrelevant to him, the point of this matter is that Omni held itself out, through its website, to the public and prospective and actual customers including Cablevision, that it directly employed its employees and employed no subcontractors.

In this respect, I reject Carr’s testimony that the contractual prohibition against subcontractors only applied when the prime contractor, such as Omni, assigned its entire responsibilities under the contract to another entity. Carr is hardly in a position to testify as to what Cablevision intended in its contract. The contract is clear, as testified by Psotta – Omni was required to have obtained Cablevision’s written consent to its use of the alleged subcontractor installers.

Other indications of the control that Omni exercises over its employees include the requirement that a certain number of jobs be inspected, and that an extensive “pre-employment” investigation of the background of the installer is conducted. Further requirements of Cablevision include a “uniform approved by Cablevision” and an identification badge with the Cablevision name. Omni was also required to furnish Cablevision on a weekly basis a list of the names of the installers and their personal information.

In addition, contractual monetary penalties for non-complying work constitutes evidence of employee status. Fines were set forth for installers who do not wear a Cablevision-approved uniform, do not utilize a white vehicle, or use a vehicle which does not bear a Cablevision sign, or lose their identification card. It is hard to believe that a true independent contractor would be subject to these penalties. It is disingenuous for Omni to argue that it did not require a white vehicle when its June, 2003 memo said that “Cablevision will be enforcing ... white vehicles. You need to have a white truck or van...” Nor is it feasible that a true independent contractor would consent to frequent inspections of his vehicle, tools, signs, safety equipment, and his personal neatness, as is the case here. Further, monetary penalties imposed for not performing the work properly, for repeat calls, damage to the customer’s home, and missed appointments support a finding of employee status.

I credit the testimony of Parris and Coombs that there was no negotiation of rates when they first began work for Omni. It is clear that the installers were presented with the agreement and asked to check with their attorneys and to sign it when they returned, which they did. The later amendment of the rates, in May, 2003, similarly involved no negotiation. There was no

credible evidence that any meaningful negotiations over rates took place. This is consistent with an employer's setting the wage rates for an employee, and not a negotiation process between two businesses.

5 The requirement that Nextel radios or cell phones be used so that Omni can keep in constant communication with the installers is evidence of employer-employee status. As Coombs testified, he was in constant contact with Sternkopf regarding which jobs were completed.

10 As in *Roadway*, where its officials lent money to the drivers to purchase a van, here Carr lent Barnes money to obtain a van. In *Roadway*, as here, a few of the drivers operate as incorporated businesses. As in *Roadway*, the installers here may use their vehicles for other commercial or personal purposes. Similar to *Roadway*, the reason that, at least Parris and Coombs have not used their vehicles for outside business is due to the long hours that they
15 work at Omni's installations. The Board found in *Roadway*, that the lack of pursuit of outside business was less a reflection of entrepreneurial choice, but was a result of the "obstacles" created by their relationship with Roadway, which was the case here with Parris and Coombs.

20 As in *Roadway*, the agreement between Omni and the installers may be terminated by mutual agreement. In *Roadway*, where employee status was found, the drivers were permitted to select their own routes. A stronger case is presented here, where the routes are selected by Cablevision. In *Roadway*, the drivers obtain their vehicles from a specific source and they must be of a particular make, model and payload. In *Roadway*, as here, the drivers may operate additional vehicles and use additional persons to operate them, with the drivers being
25 responsible for their payment and expenses. Here, there is evidence that RS Audio Video, an installer for Omni, utilized more than one vehicle. Apparently RS Audio was the only installer that operated more than one vehicle. Roadway, as Omni here, provides no paid holidays, vacations, disability, or retirement benefits to its drivers, who are responsible for the payment of their own taxes.

30 There is little opportunity for Omni's installers to engage in entrepreneurial activities which could increase their opportunity for profit. They are prohibited from soliciting Cablevision's customers to perform additional work in their homes, and they cannot set prices for Cablevision's services. Cablevision's office exclusively establishes the routes and locations of
35 customers to whom the installers are assigned. The installers cannot bid on any customer installations. Although the installers own their own vans and are able to perform services for other customers, the evidence is that only about four do so, with the testimony being that one of them, Coombs, performed work for his private customers on the two days per week that he did not work for Omni. Indeed, Coombs further testified that at the time of the hearing he worked for
40 Omni six days per week. Accordingly, there is little opportunity for the installers to increase their profits by performing services for other companies. In short, the installers primarily work for Omni, making installations and servicing its customers in routes assigned by Cablevision.

45 Thus, the installers "bear few of the risks and enjoy little of the opportunities for gain associated with an entrepreneurial enterprise." *Roadway* 288 NLRB at 198. "[I]t is clear that, unlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits." *Standard Oil Co.*, 230 NLRB 967, 968 (1977).

50 In *Roadway*, where employee status was found, the drivers were granted a "proprietary interest" in their service areas, pursuant to which the driver had a contractual right to sell his

service area, or receive compensation for customer accounts which were reassigned or removed from his delivery service area. Here, the case for finding employee status is stronger since there is no such proprietary interest in the customer accounts serviced by the installers.

5 *Adderley Industries*, 322 NLRB 1016, 1022-1023 (1997) is instructive. Adderley employed installers to provide services to the cable television customers of the Greater Media cable company. In finding that the installers were employees and not independent contractors, the Board noted that (a) the work of the installers was “integral to and virtually coextensive with” Adderley’s operations (b) the installers may perform other work for themselves or other
10 companies, but the time constraints imposed by Adderley made such options impossible during working hours (c) Greater Media and Adderley’s quality control personnel inspect the installers’ work, and if not performed properly, the installer must correct it, or would be back charged (d) the installer must perform his work consistent with the installation manual (e) each work order contains the charge to the customer for the work and all payments are made to Adderley (f)
15 installers use their own trucks and tools, with the installers required to provide their own insurance (g) installers’ trucks must be white and bear a sticker with Adderley’s name (h) installers must wear an identification badge from Greater Media (i) Adderley supplies each installer with converter boxes and other equipment needed for his work (k) the installer signed an “independent contractors agreement” which may be terminated by either party and (l)
20 installers may hire helpers. See *First Legal Support Services, LLC*, 342 NLRB No. 29, slip op. at 13 (2004).

The only material variation between *Adderley* and this case is that Adderley had a two-week training period and provided its installers with an installation manual which contained
25 precise details as to the methods of installation. Here, Omni’s installers were not trained, but they were given an installation manual which contained certain detailed procedures on IO and modem installations. Aside from this difference, *Adderley* is virtually identical to the instant case, and supports a finding that the installers here, who were engaged in the identical activity as those in *Adderley*, are employees and not independent contractors.

30 The relationship between Omni and the installers bears some similarities to the facts in *Dial*, in which the Board found that the owner-operators were independent contractors and not employees. I have considered that in *Dial*, as here, the express intent of the parties in creating their relationship, as set forth in the contract between Omni and the installers, is to create an
35 independent contractor relationship where neither the installer or his employees are to be considered employees of Omni. However, I believe that the factors present here which establish that the installers are in fact employees of Omni, override the contractual intent of the parties.

40 Certain characteristics of the relationship between the owner-operators in *Dial* and the installers here may support a finding of independent contractor status. For example, the owner-operators formed their own companies, and may use their vehicles to make deliveries for other companies. Similarly, the installers here have their own companies, but in some cases, like Parris, have not incorporated a company. The installers may work for other companies, and they do, but such work occurs on the days that they do not work for Omni. As in *Dial*, the
45 installers own their own vehicles and are responsible for their maintenance. In *Dial*, as in this case, the installer must have liability insurance. The owner-operators hired drivers and helpers to perform deliveries, and set all the terms and conditions of employment for them. *Dial* and the owner-operators may each terminate the agreement with a 24-hour notice. *Dial* provides no job training to the owner-operators. Here, there was conflicting testimony concerning whether Parris and Barnes trained installers at the Respondent’s request. Parris’ testimony was that he offered
50 to train Coombs, and Carr and Nelson approved. Coombs rode with Parris. Barnes’ testimony that manager Mack directed him to train installers is too vague to find that the Respondent

directed its installers to train others. This is particularly so where the agreement between the installers and Omni specifically states that Omni does not provide training to its installers.

The *Dial* contract gives the owner-operator the right to decline jobs. Here, the installers have no contractual right to decline jobs. Although there was evidence that the installers could express preferences for certain work, or refuse certain work, the evidence is clear, as set forth above, that the installers could not refuse assignments once given, and if they did so, they were subject to a written warning which could lead to termination. In this case, as in *Dial*, the installer agreed to reimburse Omni for losses or damages to customers' property.

As in *Dial*, the installers are not told what routes to follow in making the stops at customers' homes, and they must arrive at the customer's home at a predetermined time. As in *Dial*, the dress code requires a clean appearance.

Unlike the instant case, the *Dial* owner-operators solely determine, without instruction from Dial, the method, means and manner of performance. Here, the installer's work is subject to frequent inspection by Omni and Cablevision. Their work must conform to the standards set by Omni and Cablevision. If the installation is not done correctly the installer is responsible and must correct it. If Cablevision has to send its own technician to correct the problem, the installer is back charged for the amount of the service. The billing submitted by the installers is also subject to scrutiny by those two companies, to ensure that the proper billing codes have been applied.

Omni has exerted significant control over its installers. For example, those installers who arrive after the work has been distributed risk receiving no work. Rather than establishing independent contractor status, this factor shows that Omni controlled the time the installers arrived at work. If they arrived late, they would receive no work. This factor is similar to that experienced by the owner-operators in *Dial*. The installers have also been told that they must arrive on time. The work orders specified an arrival time window, and the length of time required for the installation. If the installer deviated from either standard, he had to notify Cablevision and Omni.

In addition, unlike the instant case, in *Dial* the owner-operators are paid directly for the customer for any additional work done by the owner-operator. Here, the installers are prohibited from soliciting customers for additional work, and any additional work must be approved by Cablevision, which bills the customer for such work.

Unlike the instant case, the owner-operators in *Dial* were subject to no requirement as to the type of vehicle they used. Here, however, the installers were required to have a white van. The Respondent argues that it simply "preferred" a white van, but the evidence supports a finding that the installers were told several times that they must have a white van. Similarly, here the installer must display the Cablevision sign on the van, whereas in *Dial*, the vehicle bore the owner-operator's name.

Unlike the instant case, if an owner-operator's truck in *Dial* had been scheduled for work, but was not at its assigned time, the owner-operator is not subject to any discipline. Here, if the installer did not come to work when he agreed to, he received a disciplinary notice. Dial, like Omni, has no progressive disciplinary system. However, Dial has terminated an owner-operator's contract for violent behavior, and has threatened termination for alcohol use, and has given one-day suspensions for refusing to remain at the warehouse, failing to call Dial from each delivery stop, failing to follow the assigned route schedule, and refusing a route assignment.

Although Omni does not assist the installers in their work, the installers do have frequent contact during the day, as needed, with Omni. Thus, the installer calls if he will not arrive on time for an installation, or needs additional equipment, or in order to obtain authorization to do additional work.

The Respondent relies heavily on the fact that Parris had a business name and a business card prior to his beginning service for Omni. I do not agree. Throughout his tenure, Parris, and the other employees were prompted by Omni to make sure that they had business names, and that checks would only be issued in their business name. Accordingly, the installers had to comply with those orders if they wished to continue their relationship with Omni. Rather than showing independence from Omni, the compliance of the installers establishes a connection to and dependence on that company. I place little emphasis on the installers' written acknowledgement that they are independent contractors. At various times, the Respondent sought documentation from the installers, whose only real purpose was to support its attempt to establish them as independent contractors. Thus, they were required to list a business name on their agreement, and they were required to submit business cards in the name of a business.

The notification procedures are evidence of employee status. Thus, the installers had to notify Omni in advance whether they would be at work. I have rejected the testimony of Donaldson and Sternkopf that no adverse action was taken against installers who refused an assignment, or did not appear for work, and have found, consistent with the memos of Carr and Sternkopf, that the absent installers were fined and, for a second violation, faced termination. I also find, in contrast to Donaldson's testimony that refusing work does not constitute a violation of the installer's contract, that upon Parris' refusal to accept an assignment, he was issued a written violation, with threat of termination, for failing to complete contracted work in a timely manner and failing to meet contracted manpower obligations.

The work schedules also are evidence of employee status. Installers were notified that they must work on the day after Thanksgiving and the day after Christmas Day. The fact that some did not work on those days does not negate a finding that this requirement was set by Omni. It is a common practice for employees to be required to work on certain days, but it is somewhat unusual for independent contractors to be so required.

The extensive involvement in the installer's work by Omni is clearly demonstrated by the elaborate notification procedure utilized when the installer expected to be late. He had to call the customer, Cablevision and Omni. In addition, he called Sternkopf or Donaldson if a problem arose, or if he needed additional equipment. The installers may have been doing the physical work on their own in the customer's homes, but had an extensive support network which they had to utilize in resolving problems, and rearranging appointments. Further, the installers were in constant contact with Omni officials by Nextel radio or cell phone, which they were required to carry. I credit Coombs' testimony that he reported to Sternkopf the progress of his work during the day.

In conclusion, I do not believe that the Respondent has met its burden of proving that Parris is an independent contractor. I accordingly find and conclude that he is an employee of Omni.

II. Raphael Parris

A. Parris' Protected, Concerted Activity

5 The complaint alleges that in late June, 2003, Parris engaged in concerted activity regarding wages, hours and working conditions of the Respondent's employees by (a) complaining about pay discrepancies on his own behalf and on behalf of other employees (b) threatening to strike unless the Respondent addressed those pay issues and (c) on about June 10 25, 2003, assisted another employee in a dispute with the Respondent over the performance of certain clerical duties.

15 Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. An employer may not, without violating the Act, discharge or otherwise threaten, restrain, or coerce employees because they engage in such activities. *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1102-1103 (2000). As set forth above, I credit the testimony of Parris that he complained about pay discrepancies on behalf of other installers and that he threatened to strike if those issues were not addressed immediately. Engaging in a strike in order to obtain a resolution of pay issues, and threatening to strike for 20 that reason constitutes protected, concerted activity. The Respondent's threat to replace the installers and shut down the system because of the threat to strike violates Section 8(a)(1) of the Act. *Accurate Wire Harness*, 335 NLRB 1096 (2001); *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001). *TPA, Inc.*, 337 NLRB 282, 286 (2001) involved a similar situation in which employees, protesting a change in procedure, refused to work until the matter 25 was resolved. Their strike was protected, and the threat to discharge them for striking was held to violate the Act.

30 I credit the testimony of Parris and Coombs that, on the day of his termination, Parris interceded in behalf of Coombs who wanted to finish writing his orders before he accepted new work orders from Timothy Carr. They gave detailed testimony about the altercation between Parris and Carr, as compared to Carr's flat denial that the incident occurred. Moreover, it was Carr's admitted responsibility to collect paperwork from the installers. That is exactly what he was doing, attempting to collect Coomb's paperwork when Parris interceded.

35 Parris engaged in protected, concerted activity by, in behalf of Coombs, protesting Carr's order that Coombs immediately present his paperwork, and the change of a practice that permitted installers to write their paperwork in the office. Thus, Parris engaged in protected, concerted activity when he assisted Coombs in presenting a grievance to the Respondent, and protested a change in the practice of preparing paperwork. See *Fire Fighters*, 304 NLRB 401, 40 430 (1991). Inasmuch as I find that Parris intervened in behalf of Coombs with Timothy Carr at that time, I find that Carr had knowledge of Parris' protected, concerted activity.

45 I also find that Timothy Carr possessed knowledge of Parris' threat to strike. In the absence of direct evidence of an employee's protected, concerted activities, the Board examines all the circumstances to determine whether the employer's knowledge of those activities can be inferred. See *Music Express East, Inc.*, 340 NLRB No. 129, slip op. at 1 (2003).

50 I cannot credit Carr's denial that he knew that Parris threatened to strike if the installers' pay issues were not resolved immediately. Although Timothy Carr was not assigned to the Mamaroneck location at the time of the threat to strike, knowledge can be inferred based on the following factors:

(1) Carr worked in the Respondent's Connecticut office and held a position comparable to that of Donaldson, the operations manager who was well aware of the incident.

(2) Carr was the Respondent's operations manager, responsible for the contract labor for the Cablevision contract. As such, he would be presumed to know of the "major incident" described by Donaldson in which the installers refused to work.

B. The Termination of Parris

The complaint alleges that Parris was discharged because he engaged in the protected, concerted activity set forth above. The Respondent denies that it discharged Parris for such conduct, and asserts that it terminated Parris' contract because of his confrontation with Carr on June 25.

Inasmuch as I have found that Parris was engaged in the protected activity of protesting Carr's actions toward Coombs at the time of his discharge on June 25, I find that the conduct for which he was terminated was his protected activity. Since Parris was terminated for engaging in this protected activity, there is no dual motive to analyze. Accordingly, the analysis should begin and end with a determination of whether Parris' actions on June 25 caused him to lose the protection of the Act. *Sprint/United Management Co.*, 339 NLRB No. 127, slip op. at 7 (2003). *Felix Industries*, 331 NLRB 144, 146 (2000). Accordingly, the factors set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816-817 (1970) are applicable.

In the interest of completion, I will also apply a *Wright Line*¹⁰ analysis since the complaint alleges that Parris was also discharged for his earlier protected activity, and accordingly alleges a dual motive for the termination.

Under *Atlantic Steel*, the Board examines the following factors in determining whether an employee engaged in protected activity loses the protection of the Act by opprobrious conduct: (1) the place of the discussion (2) the subject matter of the discussion (3) the nature of the employee's outburst and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice. I will consider those factors in relation to Parris' conduct on June 25, the date of his termination.

The first factor, the place of the discussion, weighs in favor of Parris' protected conduct. The discussion took place in the distribution area where the work is assigned. It was the location where Parris reported in order to obtain his work orders. Carr began the discussion by ordering Coombs to submit his paperwork, or in Carr's version, asking Parris if he threatened Sternkopf. Accordingly, the place of the discussion was chosen by Carr. In either event, the comments were made to Carr in a face-to-face meeting with Carr in which Parris sought to present his grievances. See *Aluminum Co. of America*, 338 NLRB No. 3, slip op. at 3 (2002). Although Parris' remarks were made in the presence of other employees, they were made during the course of his intervention in behalf of Coombs, and his answer to Carr's accusation that he threatened Sternkopf.

The second factor, the subject matter of the discussion, weighs in favor of protected activity inasmuch as it involved Parris' intervention in behalf of Coombs, and his protest against Carr's order that Coombs could not prepare his paperwork in the office.

¹⁰ 251 NLRB 1083 (1980).

The third factor is the nature of Parris' outburst. I credit Carr's testimony that Parris was loud, very angry, shaking, and walked toward him with his arms waving up and down, saying "you have no fucking right to ask me this question." By Parris' own testimony, he had an argument with Carr during this incident. I credit Carr's testimony that he felt "very threatened" by this conduct, having been aware of Parris' past conduct. Such conduct included tipping a table at a supervisor, throwing a chair against a wall, and engaging in, according to his own testimony, two prior "out of control" shouting matches with the Respondent's supervisors. I credit Carr's version that Parris cursed at him, since I also credit Cablevision manager Psotta's testimony that he saw Parris shout and curse at Donaldson in the past. Psotta, a neutral witness, impressed me as a particularly credible witness. This factor weighs heavily against protected conduct.

The Respondent urges that I not consider Parris' outburst in a vacuum. It argues that I must consider the June 25 incident in connection with Parris' previous improper conduct. In fact Carr testified that he decided to terminate Parris' contract because he believed that Parris had demonstrated that he was prone to commit violence in the workplace, basing that belief on this last incident in which he felt "very threatened," Parris' threat to Sternkopf that day, and his lunging over the desk at Donaldson. Indeed, Parris' testimony that he told Sternkopf, "if you mess with my work orders, you will find out when I get there," can reasonably lead to an inference that he thereby threatened Sternkopf, who testified that he believed that he had been threatened.

The fourth factor, whether the outburst was provoked by the Respondent's unfair labor practice, weighs against protected conduct since the outburst arose by Carr's requirement that Coombs submit his paperwork, warning him that he must prepare it at home, and by Carr's question whether Parris had threatened Sternkopf.

I have weighed the nature of Parris' outburst against the other three factors, and find that, as perceived by Carr at that time, taken together with his knowledge of Parris' prior physical conduct, that his conduct was so opprobrious to cause him to lose the protection of the Act. *Trus Joist MacMillan*, 341 NLRB No. 45, slip op. at 4 (2004). The three factors in favor of protection are outweighed by the nature of Parris' outburst, which strongly favors a loss of protection.

In making a *Wright Line* analysis, I find that Parris engaged in the protected, concerted activity outlined above. I further find that his threat that the installers would strike if their pay issues were not corrected was a motivating factor in the Respondent's termination of him. The threat to strike occurred only a couple of weeks before his termination, and was regarded by the Respondent as a "major incident." As set forth above, I have found that Timothy Carr could reasonably be found to have become aware of Parris' threat to strike, and, according to Coombs, called him as a "troublemaker" at the time of his termination.

However, I find that the Respondent has met its burden of proving that it would have terminated Parris even in the absence of his protected activity. I make this finding because of the incident in which Parris threatened Sternkopf, and engaged in loud, profane, threatening gestures by waving his arms up and down in front of Timothy Carr on June 25. I have considered the facts that Parris engaged in physical conduct toward Donaldson prior to this time and had not been terminated, and had also engaged in loud arguments and profanity with supervisors without discipline being imposed. Timothy Carr was not personally involved in those prior incidents. But to this supervisor, Timothy Carr, at this time, Parris continued improper conduct could no longer be tolerated. In terminating Parris, Carr considered Parris' threatening conduct that day, and his prior conduct, and properly concluded that Parris' conduct could no

longer be endured. "Physical intimidation of a supervisor is most serious." *Tri-City Fabricating & Welding Co.*, 316 NLRB 1096 (1995). I therefore find that the Respondent has met its *Wright Line* burden.

5 **Conclusions of Law**

1. Raphael Parris is an employee under Section 2(3) of the Act, and is not an independent contractor.

10 2. By threatening to shut down its facility if its employees engaged in a strike or other concerted activity, the Respondent violated Section 8(a)(1) of the Act.

3. By threatening to discharge its employees if they engaged in a strike or other concerted activity, the Respondent violated Section 8(a)(1) of the Act.

15 4. By discharging Raphael Parris, the Respondent did not violate the Act.

The Remedy

20 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

25 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

30 The Respondent, Omni Engineering, LLC, Milford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

35 (a) Threatening to shut down its facility if its employees engaged in a strike or other concerted activity.

(b) Threatening to discharge its employees if they engaged in a strike or other concerted activity.

40 (c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

45 (a) Within 14 days after service by the Region, post at its facilities in Milford, Connecticut, and Mamaroneck, New York, copies of the attached notice marked "Appendix."¹²

50 ¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹² If this Order is enforced by a Judgment of the United States Court of Appeals, the words

Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 20, 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

Steven Davis
Administrative Law Judge

in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

5 Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board has found that we violated the National Labor Relations Act
and has ordered us to post and abide by this notice.

WE WILL NOT threaten to shut down our facility if our employees engaged in a strike or other
concerted activity.

15 WE WILL NOT threaten to discharge our employees if they engaged in a strike or other
concerted activity.

20 WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise
of the rights guaranteed them by Section 7 of the Act.

25 _____
OMNI ENGINEERING, LLC

Dated _____ By _____
(Representative) (Title)

30 This is an official notice and must not be defaced by anyone.
This notice must remain posted for 60 consecutive days from the date of posting and
must not be altered, defaced, or covered with any other material. Any questions concerning this
35 notice or compliance with its provisions may be directed to the Board's Office, 26 Federal Plaza,
Room 3614, New York, New York 10278-0104, Telephone 212-264-0346.

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